Chon Ah Jee @ Chuan Teck Chun & Ors v Lim Tian Huat (as the receiver and manager appointed for Bigraise Telipok Sdn Bhd) & Anor

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO K24–192 OF 2007–II
CLEMENT SKINNER J
9 DECEMBER 2009

Companies and Corporations — Receivership — Receivers — Power of receiver derived under joint venture agreement and irrevocable power of attorney — Power of receiver to sell and dispose of assets — Land held under charge — Whether receiver entitled to sell land and properties on land with consent of charge by way of private treaty — Whether receiver obliged to sell land and properties on land by way of statutory foreclosure proceedings

Companies and Corporations — Receivership — Receivers — Receiver appointed by company — Whether receiver an officer of company — Whether receiver enjoying same powers, rights and privileges enjoyed by company

Companies and Corporations — Winding up — Power of attorney, validity of — Power of attorney given by wound up company — Power of attorney given for valuable consideration — Power of attorney declared to be irrevocable by donor — Power of attorney given for performance of contractual obligations owed to donee — Whether winding up of donor would affect validity of power of attorney or render such power revocable — Position in West Malaysia v East Malaysia — Powers of Attorney Act 1949 s 6 — Powers of Attorney Act 1971 (UK)

English Law — Contract — Commercial contracts — Power of attorney declared irrevocable by donor, given for valuable consideration and for performance of contractual obligations owed to donee — Whether winding up of donor rendered such power of attorney invalid or revocable — Powers of Attorney Act 1971 (UK) s 4

Land Law — Charge — Sale of land — Whether receiver entitled to sell charged land and properties on land with consent of chargee by way of private treaty — Whether receiver obliged to sell land and properties on land by way of statutory foreclosure proceedings

BR (Bigraise) owned two parcels of land ('the first two lands') whereas BRT ('Bigraise Telipok') owned another piece of land ('the third land'). BRT and

A BR entered into a JV agreement ('the JVA') to develop BR's first two lands into a residential, industrial and commercial complex ('the project'). Pursuant to the terms of the JVA, BR formally executed a power of attorney appointing BRT as its lawful attorney to implement the JVA. Subsequently, BRT executed two debentures and a charge over its third land in favour of the B second defendant as security for loan facilities. BR also executed two debentures ('BR's debentures') and a charge over its first two lands as security in favour of the second defendant for the loan facilities granted to BRT. BRT drawdown on the loans, encountered financial difficulties and failed to complete the project. The first defendant was subsequently appointed receiver C and manager for BRT under the debentures executed by BRT. BR subsequently was wound up. The first defendant later attempted to sell off, by private treaty, the first two lands and apartment units built under Phase 1 of the project over the first two lands. The plaintiffs objected to the sale and filed for several declarations in the High Court. The plaintiffs contended that D since the first defendant was never appointed the receiver and manager under BR's debentures, he had no authority to sell the first two lands. The plaintiffs also contended that under BRT's debentures, the defendants had no power to sell the first two lands and the third land without resorting to the procedures under the Sabah Land Ordinance.

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Held, dismissing the plaintiffs' originating summons with costs:

(1) With regard to the first declaration sought, the plaintiffs were under a false assumption that the receiver was selling the first two lands under F the two debentures signed by BR in favour of the second defendant. The receiver was in fact acting pursuant to the rights and powers contained in the JVA between BRT and BR and the power of attorney given by BR as donor to BRT to implement the joint venture. The receiver was not seeking to exercise any powers under the two G debentures executed by BR (see paras 17–18).

(2) When the receiver was appointed in respect of BRT, the receiver became and was to act as an 'officer' of BRT just like the directors of the company. In relation to the JVA entered into with BR, the receiver as H an officer of BRT had a responsibility to ensure that the obligations of BRT were honoured and the receiver as such officer, would possess the same powers, rights and privileges that BRT possessed (see para 19).

(3) The power of attorney executed by BR in favour of BRT was one given for valuable consideration and irrevocable under any circumstances. I Although BR was wound up, in West Malaysia, its winding up would not affect the power of attorney due to the exceptions in s 6 of the Powers of Attorney Act 1949 ('the Act'). Notwithstanding the non-applicability of the Act to Sabah and the absence of local statutory provisions in Sabah, by virtue of s 5(1) and (2) of the Civil Law Act

1956, the English Powers of Attorney Act 1971 would apply and render the power of attorney irrevocable since: (i) the power of attorney was expressly declared by BR to be irrevocable; and (ii) the power of attorney was given pursuant to the performance of contractual obligations owed to BRT under the JVA whereby such obligations had not been fully discharged (see paras 23–27); *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201 referred.

(4) Concerning the second declaration, in respect of the first two lands, the first defendant was acting pursuant to BRT's rights and powers under the JVA and the power of attorney in selling the apartment units and part of the first two lands. He was not acting pursuant to the debentures executed by BR. Since the first defendant was not attempting to foreclose or sell off the first two lands or the units built thereon under the charge or even the debentures, there was absolutely no reason why he needed to proceed in accordance with the provisions of the Sabah Land Ordinance. With regard to the sale of the third land, the debenture empowered the first defendant to act as the lawful attorney of BRT and as its agent. The first defendant was thus acting as the agent of BRT and as the chargor of the land. It was clear that a landowner may sell off his own land by private treaty with the consent of a chargee and there is no reason in such case to go through the provisions of the Sabah Land Ordinance. The sale of the third land in the instant case was not a sale at the instance of the chargee (see paras 31–33); *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 not followed; *Melatrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor* [2003] 2 MLJ 193 referred.

[Bahasa Malaysia summary

BR (Bigraise) memiliki dua bidang tanah ('dua bidang tanah yang pertama') manakala BRT ('Bigraise Telipok') memiliki sebidang tanah yang lain ('tanah yang ketiga'). BRT dan BR menandatangani perjanjian usaha sama ('PUS') untuk membangunkan dua bidang tanah yang pertama milik BR kepada kawasan kediaman, perindustrian dan kompleks perdagangan ('projek tersebut'). Berikutan terma-terma PUS tersebut, BR secara rasmi melaksanakan surat kuasa wakil dengan melantik BRT sebagai wakil sahnya untuk menjalankan PUS tersebut. BRT kemudiannya melaksanakan dua debentur dan gadaian ke atas tanah ketiga tersebut atas nama defendan kedua sebagai sekuriti untuk kemudahan-kemudahan pinjaman. BR juga melaksanakan dua debentur ('debentur-debentur BR') dan gadaian ke atas dua tanah yang pertama sebagai sekuriti atas nama defendan kedua untuk kemudahan-kemudahan pinjaman yang diberikan kepada BRT. Penggunaan pinjaman-pinjaman tersebut oleh BRT, telah menyebabkan kesulitan

kewangan dan gagal untuk menyelesaikan projek tersebut. Defendan pertama kemudiannya melantik penerima dan pengurus untuk BRT di bawah debentur-debentur yang dilaksanakan oleh BRT. BR kemudiannya telah digulungkan. Kemudian defendan pertama mencuba untuk menjual, melalui perjanjian persendirian, dua tanah yang pertama dan unit-unit pangsapuri yang dibina di bawah fasa 1 projek tersebut di atas dua tanah yang pertama tersebut. Plaintif-plaintif membantah jualan tersebut dan memfailkan beberapa perisytiharan di Mahkamah Tinggi. Plaintif-plaintif berhujah bahawa memandangkan defendan pertama tidak pernah dilantik sebagai penerima dan pengurus di bawah debentur-debentur BR, dia tidak mempunyai kuasa untuk menjual dua tanah yang pertama tersebut. Plaintif-plaintif juga berhujah bahawa di bawah debentur-debentur BRT, defendan-defendan tidak mempunyai kuasa untuk menjual dua tanah yang pertama dan tanah ketiga tersebut tanpa merujuk kepada prosedur-prosedur di bawah Ordinan Tanah Sabah ('Ordinan').

Diputuskan, menolak saman pemula plaintif-plaintif dengan kos:

(1) Berhubung dengan perisytiharan yang dipohon, plaintif-plaintif adalah di bawah anggapan salah bahawa penerima menjual dua tanah yang pertama tersebut di bawah debentur-debentur yang ditandatangani oleh BR atas nama defendan kedua. Penerima sebenarnya bertindak berikutan hak-hak dan kuasa-kuasa yang terdapat di dalam PUS di antara BRT dan BR dan surat kuasa wakil yang diberikan oleh BR sebagai penderma kepada BRT untuk menjalankan usaha sama tersebut. Penerima tidak memohon untuk menjalankan apa-apa kuasa di bawah kedua-dua debentur yang dilaksanakan oleh BR (lihat perenggan 17–18).

(2) Apabila penerima dilantik berkaitan dengan BRT, penerima tersebut menjadi dan bertindak sebagai 'pegawai' BRT sama seperti pengarah-pengarah syarikat tersebut. Berkaitan PUS yang ditandatangani dengan BR, penerima tersebut sebagai pegawai BRT mempunyai tanggungjawab untuk memastikan bahawa kewajipan-kewajipan BRT dilaksanakan dan penerima sebagai pegawai sedemikian mempunyai kuasa-kuasa, hak-hak dan keistimewaan yang sama yang dimiliki oleh BRT (lihat perenggan 19).

(3) Surat kuasa wakil yang dilaksanakan oleh BR atas nama BRT adalah sesuatu yang diberikan pertimbangan bernilai dan tidak boleh ditarik balik di bawah apa-apa keadaan. Walaupun BR telah digulungkan, di Semenanjung Malaysia, penggulungannya tidak akan menjejaskan surat kuasa wakil kerana pengecualian-pengecualian di dalam s 6 Akta Surat Kuasa Wakil 1949 ('Akta'). Meskipun Akta tersebut tidak beraplikasi kepada Negeri Sabah dan ketiadaan peruntukan-peruntukan statutori tempatan di Sabah, melalui s 5(1) dan (2) Akta Undang-Undang Sivil

1956, Powers of Attorney Act 1971 Inggeris akan beraplikasi dan membuat surat kuasa wakil tidak boleh ditarikbalik memandangkan: (i) surat kuasa wakil tersebut adalah secara nyata diisytiharkan oleh BR sebagai tidak boleh ditarik balik; dan (ii) surat kuasa wakil tersebut telah diberikan berikutan pelaksanaan kewajipan-kewajipan kontrak yang patut diberikan kepada BRT di bawah PUS tersebut yang mana kewajipan-kewajipan tersebut masih belum dilaksanakan sepenuhnya (lihat perenggan 23–27); *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201 dirujuk.

(4) Berkaitan perisytiharan kedua, mengenai dua bidang tanah yang pertama, defendan pertama bertindak berikutan hak-hak dan kuasa-kuasa BRT di bawah PUS tersebut dan surat kuasa wakil dalam menjual unit-unit pangsapuri dan sebahagian daripada dua bidang tanah yang pertama tersebut. Dia bukan bertindak berikutan debentur-debentur yang dilaksanakan oleh BR. Memandangkan defendan pertama tidak mencuba untuk merampas atau menjual dua tanah yang pertama tersebut atau unit-unit yang dibina di atasnya di bawah gadaian atau mahupun debentur-debentur tersebut, sama sekali tidak terdapat sebab mengapa dia perlu untuk meneruskan mengikut peruntukan-peruntukan Ordinan tersebut. Berhubung dengan jualan tanah ketiga tersebut, debentur telah memberikan kuasa kepada defendan pertama untuk bertindak sebagai wakil sah BRT dan sebagai ejennya. Defendan pertama oleh itu bertindak sebagai ejen BRT dan sebagai penggadai tanah tersebut. Adalah jelas bahawa pemilik tanah boleh menjual tanahnya sendiri melalui perjanjian persendirian dengan izin pemegang gadaian dan tidak terdapat sebab dalam kes sedemikian untuk bertindak melalui peruntukan-peruntukan Ordinan tersebut. Jualan tanah ketiga tersebut dalam kes ini bukan jualan atas permintaan pemegang gadaian (lihat perenggan 31–33); *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 tidak diikut; *Melatrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor* [2003] 2 MLJ 193 dirujuk.]

Notes

For a case on commercial contracts, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) para 2416.

For cases on receivers, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 676–677.

For cases on sale of land, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2586–2587.

For cases on winding up generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 973–1601.

Cases referred to

K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor [2005] 2 MLJ 201; [2005] 1 CLJ 793, FC (refd)

Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805, SC (not folld)

Melatrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor [2003] 2 MLJ 193, FC (refd)

Wellington Steam Ferry Company (Limited) (in liquidation) and Anor v The Wellington Deposit Mortgage and Building Association (Limited) (1915) 34 NZLR 913 (refd)

Legislation referred to

Civil Law Act 1956 s 5(1), (2)
Companies Act 1965 s 4(1)(a), (b)
National Land Code
Powers of Attorney Act 1949 s 6
Powers of Attorney Act 1971 [UK] s 4(1)
Sabah Land Ordinance

Marzuki Spawi (Marzuki Spawi & Co) for the plaintiffs.
Sonny Durai (Allion Kitingan & Partners) for the first defendant.
David Fung (Alex Pang & Co) for the second defendant.

Clement Skinner J:

[1] I had earlier dismissed the first, second and third plaintiffs' amended originating summons (encl 37) with costs. I now give my reasons for doing so.

[2] The plaintiffs' originating summons was directed against the first defendant, Mr Lim Tian Huat who in his capacity as receiver and manager of Bigraise Telipok Sdn Bhd was trying to sell off certain properties belonging to the companies hereafter mentioned by way of private treaty in the circumstances hereafter described.

[3] The plaintiffs are common directors and shareholders in two companies, namely, Bigraise Telipok Sdn Bhd ('Bigraise Telipok') and Bigraise Sdn Bhd ('Bigraise').

[4] Bigraise is the owner of two parcels of land held under CL No 015329423 and CL No 015328711 ('the first two lands'). Bigraise Telipok is the owner of a piece of land held under CL No 015108282 ('the third land').

[5] On 28 February 1997, Bigraise Telipok and Bigraise entered into a joint venture agreement ('the JV agreement') whereby Bigraise Telipok would develop Bigraise's first two lands into a residential, industrial and commercial complex ('the project'). A

[6] Under the terms of the JV agreement, Bigraise would also appoint Bigraise Telipok as its lawful attorney to implement the joint venture. On 28 February 1997, Bigraise formally executed a power of attorney in favour of Bigraise Telipok. B

[7] On 16 April 1997 and 23 July 1997, Bigraise Telipok executed two debentures respectively. The debentures were security for a loan of RM13m and RM2.8m respectively given by AmBank (M) Bhd ('the second defendant') to Bigraise Telipok; who also executed a charge over the third land to AmBank. C D

[8] Bigraise also executed two debentures on 14 April 1997 and 23 July 1997 respectively as security for the loan of RM13m and RM2.8m granted by AmBank to Bigraise Telipok. By way of additional security, Bigraise also executed a third party charge over the first two lands in favour of AmBank. E

[9] Bigraise Telipok drewdown on the loans but it subsequently encountered financial difficulty. Bigraise Telipok failed to complete the first phase of the project known as Taman Wangsa Phase I and defaulted in its payment obligations to AmBank. Taman Wangsa Phase I became an abandoned project. F

[10] On 14 May 2002, Mr Lim Tian Huat was appointed as receiver and manager ('the receiver') for Bigraise Telipok under the debentures dated 16 April 1997 and 23 July 1997. G

[11] The Ministry of Local Government and Housing ('the Ministry') then directed the revival of the project under the receiver. The receiver had to, amongst others, negotiate with purchasers who had already bought units in the project to agree to the rehabilitation, secure a facility of RM9m from the second defendant to finance the revival and completion of the project, appoint contractors and consultants, fulfill the requirements of the Ministry for a bank guarantee of RM950,000, fulfill the requirements of the Jabatan Kerja Raya ('JKR') and Dewan Bandaran Kota Kinabalu ('DBKK') for access road that could accommodate heavy vehicles to the project so as to enable the issuance of the certificate of fitness for occupation for Phase I of the project which was issued on 11 September 2007. H I

[12] On 28 February 2006, Bigraise was wound up.

[13] In about November 2007, the receiver took steps to sell off the remaining completed units in Phase I of the project and part of the first two lands by way of private treaty.

[14] On 12 December 2007, the plaintiffs commenced this action seeking several declarations which were subsequently amended to three remaining declarations only. Subsequently, the plaintiffs abandoned one declaration regarding to information relating to the project leaving the following two declarations for decision of the court, which I will now address in turn.

A declaration that the first defendant being the receiver and manager appointed for Bigraise Telipok Sdn Bhd has no authority to sell the apartments built on CL 015329423 and CL 015328711 (the first two lands) and/or the whole or part of the first two lands pursuant to the debentures dated 16 April 1997 and 23 July 1997 executed between Bigraise Telipok Sdn Bhd and AmBank as the first two lands are the properties of Bigraise Sdn Bhd and not the properties of Bigraise Telipok Sdn Bhd

[15] For the purpose of this declaration, it is not in dispute between the parties that Bigraise is the owner of the first two lands and that Bigraise did execute two debentures as well as a third party charge over the first two lands to AmBank as security for the loans given to Bigraise Telipok.

[16] It is the plaintiffs' case that since the receiver was never appointed as the receiver and manager of Bigraise pursuant to the debentures (dated 14 April 1997 and 23 July 1997) executed in favour of AmBank, he had no authority to sell the first two lands since they belong to Bigraise and not Bigraise Telipok. According to the plaintiffs, this is so because under cl 4.03 of the debentures which Bigraise executed, a receiver and manager who is appointed only has the right to take charge of the property and assets owned by Bigraise, but since the receiver and manager here was never appointed as a receiver and manager of Bigraise, he cannot sell the first two lands.

[17] It is evident to me from the contentions and submissions of the plaintiffs that they are laboring under a fundamental assumption that the receiver is selling the first two lands pursuant to the two debentures signed by Bigraise in favour of AmBank. With all respect, this is a false assumption.

[18] From Mr Lim Tian Huat's (receiver's) affidavit affirmed on 3 June 2008 (encl 39), it is evident to me that he is selling the apartments and the remainder of the first two lands pursuant to such right and power as contained in the JV agreement between Bigraise Telipok and Bigraise and the ensuing power of attorney dated 28 February 1997 given by Bigraise (as

donor) to Bigraise Telipok to implement the joint venture. In doing so, the receiver is not seeking to exercise any powers under the two debentures executed by Bigraise.

[19] In my judgment, when the receiver was appointed in respect of Bigraise Telipok on 14 May 2002, the receiver became and acts as an 'officer' of Bigraise Telipok much like the directors of the company. Section 4(1)(a) and (b) of the Companies Act 1965 defines 'officer' in relation to a corporation to include 'a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument'. Accordingly, in relation to the JV agreement entered into with Bigraise, the receiver as an officer of Bigraise Telipok has a responsibility to ensure that the obligations of Bigraise Telipok are honoured and the receiver as such officer, would possess the same powers, rights and privileges that Bigraise Telipok possesses.

[20] It is clear to me from what the receiver said in his affidavit of 3 June 2008 (encl 39) that when he went about reviving the project, raised the loans, fulfilled the conditions imposed by the Ministry, JKR and DBKK and developed the project until completion, he relied on Bigraise Telipok's rights and powers under the JV agreement entered into with Bigraise as well as the powers contained in the power of attorney which was given to Bigraise Telipok for better giving effect to the terms of the JV agreement. It is clear to me that the receiver was not exercising any powers under the two debentures which the plaintiffs refer to.

[21] Likewise when the receiver sought to sell the completed units on the first two lands as well as the whole or part of the first two lands, he continued to exercise the rights and powers under the JV agreement and the power of attorney. In my view, a reading of the rights conferred by the power of attorney on Bigraise Telipok and therefore the receiver as well, show that wide powers were conferred to sell dispose and transfer the first two lands including the completed units. In particular, para II of the power of attorney reads:

> To decide on the rental or sale prices of the units of buildings constructed or to be constructed on the said lands or part thereof and individual lots of vacant land comprised in the Project and to sell, lease, rent or otherwise howsoever deal with or dispose of the units at such time and in such manner as the Donee may at its sole discretion deem fit and for such purposes to sign, execute any documents or instruments to put such decisions into effect.

Para 16 of the power of attorney reads:

> To sign or otherwise execute all memorandum of transfers, sale and purchase agreements, assurances, conveyances, instruments and documents whatsoever for the purpose of transferring and vesting the legal title and beneficial ownership of the units of buildings in the project in the various purchasers and/or the Donees themselves or their nominee or nominees and to collect and receive from all such purchasers the purchase money payable in respect thereof.

Para 17 of the power of attorney reads:

> To sign or otherwise execute all memorandum of transfers, sale and purchase agreements, assurances, conveyances, instruments and documents whatsoever for the purpose of transferring and vesting the legal title and beneficial ownership of the said lands or any part or parts thereof in whomsoever including but not limited to the Donee themselves as the Donee deem fit or to deal with the said lands howsoever as if the Donee were the registered owner.

[22] I accordingly agree with counsel for the first and second defendant that the submissions and contentions of the plaintiffs have shown a failure to appreciate that the receiver's intended sale of the completed units and part of the first two lands was:

(a) not pursuant to the debentures given by Bigraise Telipok to the second defendant;

(b) not as an agent of Bigraise under the two separate debentures it gave to the second defendant; and

(c) not purporting to be by way of foreclosure proceedings or to enforce the charges over the first two lands under the Sabah Land Ordinance,

but are the exercise of powers of sale by Bigraise Telipok itself as developer of the first two lands under Bigraise Telipok's rights and powers contained in the JV agreement and power of attorney.

[23] The power of attorney executed by Bigraise in favour of Bigraise Telipok is one given for valuable consideration and expressed to be irrevocable under any circumstances. However, it is known that Bigraise was wound up on 28 February 2006. Generally speaking, a power of attorney ends with the demise of the donor and in the case of a company, with the winding up of the company. The question therefore arises: Did the winding up of Bigraise render the power of attorney discharged, terminated or otherwise ineffective?

[24] The plaintiffs did not present any arguments on this point. If this case was being heard in West Malaysia, the winding up would not affect the power of attorney as it would be saved by the exceptions provided in s 6 of the

Powers of Attorney Act 1949 as decided by the Federal Court in *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201; [2005] 1 CLJ 793; which applied the decision in the New Zealand case of *Wellington Steam Ferry Company (Limited) (in liquidation) and Anor v The Wellington Deposit Mortgage and Building Association (Limited)* (1915) 34 NZLR 913.

[25] The Powers of Attorney Act 1949 does not apply in Sabah, and Sabah does not have such an Enactment. Does it mean then that the power of attorney given by Bigraise to Bigraise Telipok ceased to be effective on its being wound up? I find not.

[26] The power of attorney is irrevocable and given pursuant to contractual obligations which have not been fully discharged. The direct authority for this proposition is the English Powers of Attorney Act 1971 at s 4(1). In my judgment, the English Powers of Attorney Act 1971 will apply in this case in the State of Sabah by virtue of the provisions of s 5(1) and (2) of the Civil Law Act 1956, in that, the issue or question of law now before the court is one relating to 'principals and agents' as specified in s 5(1) of the Civil Law Act, and, the power of attorney here was given in 1997 and relied on by Bigraise Telipok right through to the present time at which corresponding period the like case in England would be governed by the English Powers of Attorney Act 1971.

Now, s 4(1) of the English Powers of Attorney Act 1971 reads:

> 4 Powers of Attorney given as security
>
> (1) Where a Power of Attorney is expressed to be irrevocable and is given to secure:
>
> (a) a proprietary interest of the donee of the power; or
>
> (b) the performance of an obligation owed to the donee,
>
> then so long as the donee has that interest or the obligation remains undischarged, the power shall not be revoked:
>
> (i) by the donor without the consent of the donee; or
>
> (ii) by the death, incapacity or bankruptcy of the donor or, if the donor is a body corporate by its winding-up or dissolution.

[27] Reverting to the facts here, the two conditions are satisfied. First, the power of attorney is expressly declared by Bigraise to be irrevocable. Second, the power of attorney was given pursuant to the performance of contractual obligations owed to Bigraise Telipok under the JV agreement which

obligations have not been fully discharged as the receiver's performance of obligations under the JV agreement here and now shows.

[28] Accordingly, the plaintiffs' application for the first declaration must be refused.

A declaration that the first and second defendant by relying on the provisions of the debentures dated 16 April 1997 and 23 July 1997 did not have the power to sell CL 105329423 and CL 015108282 without resorting to the procedures for sale of charged lands prescribed under the Sabah Land Ordinance

[29] What the plaintiffs are really complaining about here is that the receiver and AmBank are relying on the two debentures executed by Bigraise to sell off the first two lands and the third land and therefore did not have the requisite power to sell the lands for the reasons they gave earlier ie the receiver was never appointed as the receiver and manager of Bigraise. Instead the plaintiffs contend that the first and second defendants cannot sell the first two lands by private treaty but must go through the prescribed foreclosure procedures provided in the Sabah Land Ordinance since the first two lands were charged by Bigraise to the second defendant. In support, the plaintiffs rely on the case of *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805. I do not agree.

[30] With all respect, I find that from the submissions made by the plaintiffs, there is a fundamental failure on the plaintiffs' part to understand or appreciate in what capacity the receiver is acting in when he decided to sell the first two lands. From their submissions, it is obvious that the plaintiffs are laboring under the mistaken belief that the receiver is seeking to rely on the powers contained in the two debentures executed by Bigraise when the receiver was never appointed as a receiver and manager of Bigraise and so cannot rely on the powers of sale stated in cll 4.03 and 4.04 of those debentures. This is a misconception on the plaintiffs' part.

[31] As far as the first two lands are concerned, the receiver has stated in his affidavit of 3 June 2008 (encl 39) and I have already indicated that I find it to be so, that he was acting pursuant to Bigraise Telipok's rights and powers under the JV agreement and the power of attorney in selling of the completed units and part of the first two lands and that he was not acting pursuant to the debentures executed by Bigraise as the plaintiffs have wrongly assumed. In so acting, I find the receiver is exercising such rights and powers as an officer of Bigraise Telipok and therefore relying on all rights and powers Bigraise Telipok had as developer in relation to the first two lands. Since the

receiver is not attempting to foreclosure or sell off the first two lands or the units built thereon under the charge or even the debentures, there is absolutely no reason why he needs to proceed in accordance with the provisions of the Sabah Land Ordinance.

[32] With regard to the third land, the receiver has stated that he is here relying on the powers given to him as receiver and manager under the debentures granted by Bigraise Telipok to the second defendant to sell off this piece of land which is owned by Bigraise Telipok. In doing so, I find that the decision in *Kimlin Housing* has no application to the facts here for the following reasons. An essential feature in the *Kimlin Housing*'s case was that the debenture under which the receiver and manager there was appointed did not contain an express provision appointing the receiver and manager as the attorney of the company and hence to sell the charged land in that capacity, and, the company subsequently went into liquidation which meant that the receiver and manager ceased to be an agent of the chargor company after that event. It was in those circumstances that the court held in *Kimlin Housing* that if the receiver and manager wanted to sell the charged lands under the debenture there, since the receiver and manager was no longer acting as agent of the chargor company (which was already wound up), but as an agent of the debenture holder ie the chargee of land, a chargee of land wishing to sell charged land can only do so in accordance with the provisions of the National Land Code.

[33] The facts of this case are quite different. Here, the debenture empowers the receiver and manager to act as the lawful attorney of Bigraise Telipok. Further, cl 4.03(d) of the debenture expressly states that on appointment, a receiver and manager shall be the agent of the chargor ie of Bigraise Telipok as owner of the land. And the same clause also expressly includes a power of sale. Even further still, Bigraise Telipok has not been wound up here. The significance of this is that, in this case, when he took steps to sell of the third land, the receiver and manager continues to act as the agent of and as if he is the chargor of the land ie Bigraise Telipok. And it is clear that a landowner may sell off his own land (even though it is charged) by private treaty if he gets the consent of the chargee to do so. There is no need for the owner/chargor in such a case to go through the provisions of the Sabah Land Ordinance to sell off the land because nobody is foreclosing on the land. This is not a sale at the instance of a chargee. Here, the land is being sold by the receiver and manager as agent of the chargor landowner ie Bigraise Telipok. That the receiver and manager may lawfully sell by private treaty in such a situation is authoritatively stated by the Federal Court in *Melatrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor* [2003] 2 MLJ 193, in which case *Kimlin Housing* was considered. In *Melatrans*, the question of law posed to the court was framed as follows: 'Notwithstanding a valid power of attorney

contained in a debenture, can the receivers and managers appointed under the debenture proceed to sell the property charged under the NLC by private treaty?'

[34] The brief facts in *Melatrans*'s case is that the first respondent who was the registered owner of a parcel of land charged it and also executed a debenture to the second respondent there as security of banking facilities by the latter. The second respondent then exercised its rights under the debenture and appointed a receiver and manager of all the assets and undertaking of the first respondent. There was a clause in the debenture empowering the receiver and manager to act as agent of the first respondent, and another clause giving the power to effect sale of the asset secured by the debenture after taking possession of them. There was also a clause irrevocably appointing the receiver and manager as the lawful attorney of the first respondent. The receiver and manager entered into a private sale of the property with the appellant who subsequently did not want to proceed with the sale on the ground that he did not think the receiver and manager had power to sell the property in view of the Supreme Court's decision in *Kimlin Housing*. The first respondent applied for a declaration that the receiver and manager was duly empowered by the debenture to sell the property. The High Court granted the declaration. The Court of Appeal affirmed the High Court's decision. The Federal Court answered the question of law posed to it in the affirmative. In doing so, the judgment of the Federal Court makes it very clear that:

(a) the Federal Court confined the application of Kimlin to its facts, ie one where the debenture did not contain an express provision appointing the receiver and manager as attorney of the company;

(b) that the statutory remedy of sale of charged land under the provisions of the National Land Code apply to all cases where the sale is undertaken by or at the instance of a chargee, and not of a chargor;

(c) that the sale was being undertaken by the receiver and manger on behalf of the first respondent, who was the chargor of the land; therefore the receiver and manager could act and exercise the power of sale (by private treaty) under the debenture.

[35] It can be seen that the facts in this case are similar to that in *Melatrans*' case. Here, the receiver and manager is not selling the land as chargee but as chargor. Therefore he need not sell according to the provisions of the Sabah Land Ordinance. The chargor, as registered proprietor is entitled to sell in such manner as the owner thinks fit and since the receiver and manager is here acting as the agent of the chargor he may sell by private treaty, subject of course to the rights and consent of the encumbrancer ie the second defendant.

[36] Accordingly, this second declaration sought by the plaintiffs must also be refused.

Plaintiffs' originating summons dismissed with costs.

Reported by Andrew Christopher Simon